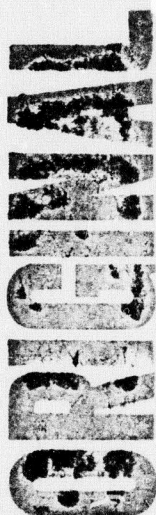


***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**



77-1288

To be argued by
STUART R. SHAW

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In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

LUIS BUSTAMANTE,

Defendant-Appellant.

*On Appeal from a Judgment of Conviction of the United States
District Court for the Southern District of New York.*

BRIEF FOR DEFENDANT-APPELLANT

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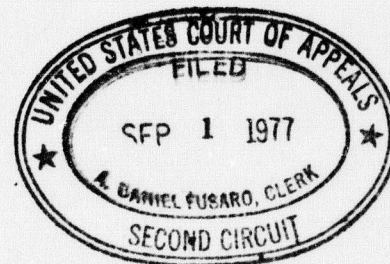


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PRELIMINARY STATEMENT

Luis Bustamante appeals from a judgment of conviction entered on June 17th, 1977 in the United States District Court for the Southern District of New York, after a jury trial before the Honorable Judge Lee P. Gagliardi.

Indictment Number 73 Cr. 953 (App. 4a) charged the Appellant in Count 1 with conspiracy to violate Sections 812, 841(a), 841(b)(1)(A) of Title 21, United States Code, and charged the Appellant in Count 2 with possession with intent to distribute narcotic controlled substances, in violation of Title 21, U.S.C. Sections 812, 841(A)(1), 841(b)(1)(A) and Title 18, United States Code Section 2. Indictment 77 Cr. 319 (App. 6a) charged the Appellant with violating United States Code Title 18, Section 3150. On April 29th, 1977, Indictment 73 Cr. 953 was consolidated for trial with Indictment 77 Cr. 319 on the Government's motion.

The jury clearly had a very difficult time reaching a unanimous verdict. This fact is illustrated by notes sent to the trial judge by the Foreman, informing him of same. The jury only reached a unanimous verdict after the trial judge, Honorable Judge Lee P. Gagliardi, gave two Allen Charges to the jury over defense counsel's objection.

The defendant's trial commenced on May 9th, 1977 and concluded on May 12th, 1977, when the jury reached a verdict. After deliberating for approximately 12 hours, the jury found the defendant guilty on Counts 1 (conspiracy), 3 (failure to appear in Court); and not guilty on Count 2

(possession with intent to distribute).

On June 16th, 1977, Honorable Judge Lee P. Gagliardi sentenced Luis Bustamante to a term of two-and-a-half years' imprisonment and special parole for five years on Count 1; and on Count 3 a period of two years' imprisonment, with six months to run consecutively with incarceration of Count 1 and the balance concurrently (T-525).

STATEMENT OF FACTS

A. The Prosecution's Case.

Ana Garcia, a Government informant and convicted felon, testified for the prosecution that Jacinto Moreira, a/k/a "Rocky," a convicted felon, was her boyfriend, with whom she lived in Queens (T-75, 76). Ms. Garcia testified that Rocky and the defendant were friends, and were engaged in the narcotics business in the summer of 1973 (T-76). Ms. Garcia alleged that she was aware of the Appellant's selling cocaine twice (T-77). However, she testified that she never saw the cocaine in the first alleged transaction, and she could not recall when the second alleged transaction took place (T-80, 82).

Rocky allegedly told Ms. Garcia that he received the cocaine from a man on a boat (T-82, 83), which Rocky stored in a clothes hamper in their (Rocky's and Ms. Garcia's) apartment (T-84). Ms. Garcia testified that she could not recall how long after Rocky received the cocaine that the Appellant visited their house. When Ms. Garcia was asked if it was within several days, she answered, "Yes." The Appellant came to Ms. Garcia's home and went into the kitchen with Rocky and another man, whose name Ms. Garcia could not remember (T-84).

Ms. Garcia stated that Rocky opened a package of cocaine, but she could not recall who weighed the cocaine, nor could Ms. Garcia state who tested the cocaine, because Ms. Garcia was asked to leave the room by Rocky (T-85).

Rocky allegedly told Ms. Garcia that he was going to leave the cocaine with the Appellant to see if the Appellant could sell it (T-86). On October 1st, 1973, the day before Rocky was to leave for Ecuador, Ms. Garcia testified that Rocky told her that he was going to meet with the Appellant that evening. On October 2nd, 1973, Ms. Garcia was arrested by the Drug Enforcement Administration agents, and began to cooperate with them (T-87-88). The agents told Ms. Garcia to telephone the Appellant, and directed her as to what to say to the Appellant over the phone (T-88, App. 54a-62a).

Ms. Garcia made a second phone call to the Appellant, but did not know how long after the first call the second call was made, because she was "very nervous" (T-90, App. 54a-62a).

After the aforementioned telephone conversations, Ms. Garcia was taken by DEA agents to 2340 Valentine Avenue, Apt. 3A, Bronx, New York, where Dora Muñoz and Pepe had lived. The DEA agents directed Ms. Garcia to try and discover where the cocaine was located. Ms. Garcia entered Muñoz' and Pepe's apartment, and told Ms. Muñoz that she was Rocky's wife, and that she was there to wait for the Appellant. She asked Ms. Muñoz if she could see some cocaine because she knew of someone who was interested in purchasing some. Ms. Muñoz allegedly showed Ms. Garcia cocaine, which was kept in the hamper, and weighed it. Ms. Muñoz said that the cocaine weighed approximately 16 ounces (T-90, 91).

Ms. Garcia remained in the apartment for approximately 15 to 20 minutes, then returned to the agents' car (T-92).

Shortly thereafter, Ms. Garcia returned to Dora Muñoz' apartment, and again told Ms. Muñoz that she was there to wait for the Appellant. This time, Ms. Muñoz allegedly called the Appellant. Ms. Garcia spoke to the Appellant and told him that she was waiting for him. The Appellant allegedly told Ms. Garcia that he was not thinking of coming to the apartment that evening (T-93). As Ms. Garcia was leaving the apartment, the DEA agents entered the apartment and arrested Ms. Garcia and Dora Muñoz (T-94).

Ms. Garcia testified that she recognized Government Exhibits 2 and 3 as the transcript of the two telephone conversations she had with the defendant. She stated that the Government made promises to her in return for cooperation with them. Those promises included that she be allowed to return home on the night of the arrest, and that the U.S. Attorney's Office would be informed of her cooperation (T-96, 97).

On cross-examination, Ms. Garcia stated that she had reviewed the facts of the case with Mr. Akerman, Assistant U.S. Attorney, and Mr. Magnuson, a DEA agent, on one day before the trial (T-108). When Ms. Garcia was cross-examined further, she admitted that she had met with Mr. Akerman and Mr. Magnuson on two days prior to the trial, not just on one day, as she had previously testified (T-108, 109). At these reviewing sessions, Mr. Akerman, of counsel, took notes and showed her the alleged transcripts of the two telephone calls she made to the defendant (T-110, App. 54a-62a).

Ms. Garcia telephoned the defendant's wife on May 6th, 1977, and told her that she was very sorry about everything that had happened (T-112, 114).

On October 2nd, 1973, the day that Ms. Garcia made the calls at the Government's direction to the defendant, Ms. Garcia testified that she had never heard the defendant use the word "cocaine," nor had she ever seen the defendant selling any cocaine (T-114, 115).

Ms. Garcia made a voluntary statement in Spanish on October 3rd, 1973 (marked defendant's Exhibit A), which was based on the Government's promise that she would be allowed home and that the U.S. Attorney would be told of her cooperation (T-119). However, in the last paragraph of said statement, it states that Ana Garcia "made this declaration without receiving any advantages or promises." Ms. Garcia had signed that document in the presence of two witnesses (T-120).

Ms. Garcia had previously visited Dora Muñoz' apartment with Rocky prior to the night she was arrested, and consequently was able to direct the DEA agents to the proper address (T-121, 122). When she was there previously, Rocky was looking for \$8,000.00 that Ms. Garcia was supposed to receive.

When cocaine was kept in Ms. Garcia's and Rocky Moreira's Queens apartment, it was stored in the bathroom hamper in a plain brown bag (T-124, 125). Ms. Garcia testified that the only time that cocaine was in her apartment was on the night Rocky received the cocaine, October 2nd, 1973, and that he put it in the hamper (T-126). However, Ms. Garcia later stated that Rocky had put the cocaine in the hamper a few days before his aborted departure to Ecuador on October 2nd, 1973 (T-128). The reason Rocky was planning to go to Ecuador was to return the cocaine he had received because it was of poor quality (T-128, 129).

On October 2nd, 1973, Ms. Garcia and Rocky were on their way to the airport, and they stopped at Rocky's cousin's house. Ms. Garcia testified that Rocky did not take cocaine into the house, but that Ms. Garcia was not sure if Rocky had any on his person, because Ms. Garcia had not seen Rocky get dressed, and Ms. Garcia had remained in the car when Rocky went into the house (T-131).

When Ms. Garcia saw Dora Muñoz remove cocaine from her dirty-laundry hamper, the Appellant was not in the apartment (T-131). Ms. Garcia never saw the Appellant give Rocky any money for cocaine; Ms. Garcia never saw the Appellant receive any cocaine from Rocky; nor did Ms. Garcia ever see the Appellant give Rocky any cocaine, or test it (T-135, 136).

Ms. Garcia testified that the Appellant had been a frequent and welcome guest in her home long before 1973, and that Ms. Garcia liked the Appellant because he always behaved like a gentleman, and that she never heard any complaints about the Appellant (T-137). When Ms. Garcia spoke to the Appellant on October 2nd, 1973, the Appellant told Ms. Garcia that he had never received any cocaine from Rocky on October 2nd, 1973 (T-138).

Ms. Garcia testified that a woman named Nancy was in the car with her and Rocky on the day they were arrested, but that her friend (Nancy) was not arrested (T-143).

On re-direct examination, Ms. Garcia said she had never seen the Appellant with cocaine (T-144).

On re-cross examination, Ms. Garcia remembered the Valentine Avenue address because she had seen Pepe give a lot of money to Rocky there (T-151). Rocky mentioned that Pepe gave him \$8,000.00, but the Appellant was not present when Pepe gave Rocky the money (T-152).

Joseph Sullivan testified that he was a special agent for the DEA. Mr. Sullivan testified that he arrested Jacinto Moreira (a/k/a "Rocky"), Ana Garcia and Nancy Ortiz on October 2nd, 1973. Mr. Sullivan testified that, at the regional office of the DEA, Ana Garcia was asked to place a telephone call to the Appellant, and that Mr. Sullivan dialed the number (T-158-159), and that the call took several minutes. Mr. Sullivan testified that a second call was made by Ana Garcia about an hour later, and that Mr. Sullivan and two other agents directed Ana Garcia as to what she should say on the phone (T-159).

Mr. Sullivan testified further that, after the second call, he (Mr. Sullivan) and some other agents drove Ms. Garcia to 2340 Valentine Avenue, Bronx. Ms. Garcia was directed to go into Apartment 3A, and when Ms. Garcia came out of the apartment, she was directed to return to it. Mr. Sullivan and other DEA agents then entered Apartment 3A (Dora Munoz' apartment), searched the apartment, and placed the occupants of the apartment under arrest (T-160--161). Mr. Sullivan testified that approximately one-half a kilogram of cocaine, and approximately \$9,500 was found in the apartment (T-162-163). Mr. Sullivan testified that the Appellant was arrested later that evening by Mr. Sullivan and three other DEA agents at his residence, 200 West 89th Street, New York City (T-163).

Mr. Sullivan identified Government Exhibit 1 as the cocaine which was found in the hamper of the Valentine Avenue apartment of Dora Muñoz, and identified scales (Government Exhibit 4) found in the bedroom of the same apartment (T-166-167).

Mr. Sullivan testified, over defense counsel's objection, that the terms "shirts" and "trousers" were common code words for cocaine (T-171, 172). On cross-examination, Mr. Sullivan stated that "snow" was also a common term for cocaine (T-174). Mr. Sullivan stated on cross-examination that he only made 20 buys of cocaine in 1973, in contradiction to his claim of having made 100 buys on direct examination (T-174).

Mr. Sullivan entered the defendant's apartment on October 2nd, 1973 (T-176), but that NO cocaine was found in the defendant's possession on October 2nd, 1973 (T-178).

Mr. Sullivan claimed that he did not recall seeing a package of shirts on Appellant's living-room floor when Appellant was arrested (T-191, 192). Mr. Sullivan claimed that the entire instant cocaine investigation arose solely out of an anonymous telephone call on September 28th, 1973, and the Appellant's name was heard for the first time by Mr. Sullivan on October 2nd, 1973 from Ana Garcia (T-192). The first time that Mr. Sullivan saw the Appellant was when he (Mr. Sullivan) and the other DEA agents arrested the Appellant at his house. Mr. Sullivan testified that he searched the Appellant's car, a 1965 Dodge, on or about October 2nd, 1973, and that no contraband was found in it (T-193). When the Appellant was arrested, his wife and child were in the apartment (T-194).

Mr. Sullivan stated that Ana Garcia was a "cooperating individual," and that she supplied the original information which led him to believe that the Appellant was involved in the alleged cocaine conspiracy (T-195).

Mr. Sullivan recovered \$9,500.00 in the apartment of Dora Muñoz, but the bills found were not investigated for fingerprints (T-197).

No contraband or large quantities of money were ever removed from the Appellant's apartment or person (T-197). The cocaine found in Dora Muñoz' apartment was in the bathroom hamper in a plastic bag, but Mr. Sullivan was not sure if it was in one or two bags (T-199).

The contraband which was found in Ms. Muñoz' apartment was field-tested (T-200). The DEA agents who accompanied Mr. Sullivan when he entered the Appellant's apartment were Agents Meale, Kennedy and Magnuson (T-202).

Mr. Sullivan testified that he read his DEA report of the investigation before coming to Court, and that his memory was greatly refreshed as to the events which transpired in October 1973 (T-203). Mr. Sullivan did not recall seeing any scales in the Appellant's apartment (T-206).

Mr. Sullivan testified that he originally had custody of the alleged tape recordings of the telephone calls which were allegedly made by Ana Garcia. Mr. Sullivan claimed he then transferred them to the then-Assistant U.S. Attorney, Daniel Pykett, on November 2nd, 1973 (T-208).

Mr. Edward Magnuson testified that he was an agent with the Drug Enforcement Administration for about five years (T-210). On March 19th, 1977, Mr. Magnuson interviewed the Appellant and the Appellant was advised of his constitutional rights by Mr. Lawler, an Assistant U.S. Attorney (T-210, 211). During the interview, the Appellant stated that he had been arrested once before, but was released on a personal recognizance bond (T-212).

When Mr. Magnuson asked the Appellant why he had been arrested, the Appellant answered, "Because I had spoken to a woman on the telephone" (T-212). During the interview, the Appellant stated that he was in Court for his trial two times, but then he jumped bail and returned to his native country, Ecuador (T-213).

On cross-examination, Mr. Magnuson stated that he (Mr. Magnuson) was present at the Appellant's arrest in 1973 at the Appellant's apartment, but he did not recall if he (Mr. Magnuson) looked into any of the Appellant's drawers at that time (T-214, 215).

A stipulation was entered into between the prosecution and defense counsel, agreeing that if Edward Manning, a DEA chemist, would testify, he would state that Government Exhibit 1 was cocaine, with a net weight of 485.48 grams, and that it was 59.7 percent pure (T-224, 225).

Libia Clancy testified that she was employed as a Spanish interpreter by the U.S. Attorney's Office (T-226). Ms. Clancy stated that she had testified in Court approximately 12 times before for the prosecution (T-227).

Ms. Clancy testified that she believed that in 1973, Mr. Pykett, an Assistant U.S. Attorney, requested that she (Ms. Clancy) translate a Spanish tape into English (T-227). Translations were made of two transcripts on November 7th and 8th of 1973, according to Ms. Clancy's personal records. Ms. Clancy identified the Government's Exhibit 2 from the type face, which was from a prestige-elite IBM Selectric typewriter, and from the format of the transcript; and Ms. Clancy also identified the transcripts as her work, due to the use of the term "Unreadable" whenever the tape was unintelligible (a term used by other interpreters as well) (T-228).

Ms. Clancy testified that she believed she delivered the transcripts to Mr. Pykett in 1973 (T-229). Ms. Clancy started working in the Courts on or about 1967 or 1968, and translated her first set of tapes in 1973. Ms. Clancy did not translate many tapes for the Southern District of New York (T-230). Ms. Clancy usually kept records of the transcripts she made, but she had left those records at home (T-231). Ms. Clancy did not see any of her initials on the transcripts (T-232). Ms. Clancy identified the paper that the transcripts were printed on as the type she used, which was Sphinx rag paper (T-233). Ms. Clancy could not recall how she billed for the transcripts. Ms. Clancy did not recall how long it took her to translate the tapes. She stated she was only 90 percent sure that she had translated the tapes, and that there was 10 percent doubt in her mind (T-234).

In October 1973, Ms. Clancy worked primarily for Mr. Puccio and the U.S. Attorney's Office in the Eastern District of New York (T-234). Ms. Clancy told Mr. Akerman, before coming to Court, that she had

records of her work, but she stated that Mr. Akerman did not tell her to bring the records with her to Court (T-235).

Ms. Clancy described the step-by-step process she followed when she transcribed a tape recording. She would put the tape into the transcriber and listen to the tape; then she would start again and begin translating by hand-writing the translation; then she would type the handwritten translation. After she compared the handwritten transcript with the typewritten one, she would discard the handwritten notes (T-237). Ms. Clancy's records, "oddly enough," were not labeled with a case name or the individuals' names who were on the tapes. The transcripts were always hand-delivered (T-238). Ms. Clancy received a check from the Government after delivering the tapes, but she had no record of said check. There is generally a copy of the bill or the voucher sent to her, but Ms. Clancy did not keep those records (T-239).

Thomas Charles Leupp is and has been a criminal investigator with the Department of Justice, the Department of Immigration and Naturalization for approximately nine years (T-248). On May 3rd, 1977, Mr. Leupp was at the MCC interviewing the Appellant regarding his status in the United States, which is a routine practice when any alien is arrested (T-248, 249).

At the interview, Mr. Leupp identified himself to the Appellant, and then asked the Appellant if he spoke English. The Appellant said, "No — a little bit," and Mr. Leupp proceeded to conduct the interview in Spanish (T-249). Mr. Leupp identified Government Exhibit 6 as a form advising the Appellant of his rights in Spanish, which the Appellant signed (T-251). Before the Appellant signed the form, he asked Mr. Leupp if, by

signing it, he was admitting any guilt, and Mr. Leupp answered, "No," he was just being advised of his rights. After the Appellant signed the form advising him of his rights, he gave Mr. Leupp a statement, which was marked as Government's Exhibit 7 for identification (T-253). The statement is in English, but Mr. Leupp translated the statement into Spanish for the Appellant (T-255).

Mr. Leupp identified Government Exhibit 9 as an application submitted by the Appellant on April 16th, 1974 for an alien registration card which had been lost or changed (T-256, 257, 258). Mr. Leupp went to the U.S. Attorney's Office after he interviewed the Appellant on May 3rd, 1977 (T-258-259).

Prior to going to the U.S. Attorney's Office, Mr. Leupp had spoken to Mr. Akerman about Mr. Akerman's request to see the Appellant's alien file (T-259). The investigation of the Appellant was predicated on a telephone call from Agent Magnuson of the DEA, stating that the Appellant had been arrested and incarcerated at the MCC. Mr. Leupp was not advised of the fact, nor did he ask if the Appellant had an attorney (T-260, 261).

Daniel F. Pykett is a self-employed attorney who was a special Assistant U.S. Attorney in the Southern District of New York in November 1973. Mr. Pykett was assigned to a case regarding the Appellant (T-264). Mr. Pykett identified Government Exhibit 10 as the telegram he sent to the Appellant to advise him of the date of his trial on November 26th, 1973 (T-268).

Mr. Pykett did not recall how many tapes were made in this case (T-266), nor was he sure if the tape was of Dora Muñoz or Ana Garcia (T-266, 267). When Mr. Pykett was shown Government Exhibits 2 and 3, he recalled that they were the tapes of a conversation between the Appellant and Ana Garcia.

Mr. Pykett originally received the tape from an agent in the DEA, and then, to the best of his recollection, he gave the tape to Libia Clancy, an interpreter, in order to have a transcript prepared (T-267). Mr. Pykett received the tape along with the transcript back from the interpreter, but did not recall how many transcripts there were (T-268). Mr. Pykett did not know what happened to the tape since he received it. Mr. Pykett did not listen to the tapes and the last time he saw them was when they were returned by the interpreter. He does not know what he did with the tapes. The normal routine followed was that tapes were returned for trial and after trial they were returned to the agents (T-272).

Mr. Pykett was informed that the tapes were missing by Mr. Akerman on or about April 2nd, 1977. Mr. Pykett did not know where the tapes are, nor did he know if the transcripts he received are accurate translations of what was on the tape (T-272-273). Mr. Pykett did not know if the tapes disappeared while they were in his custody. Mr. Pykett had no recollection of returning the tapes or putting them in a file or safe (T-274). Mr. Pykett had the tapes in his custody when he appeared for trial in 1973; after that he could not recall what became of them, and he never made an inventory of his files at that time (T-274).

Libia Clancy was recalled and reiterated that she used Sphinx brand paper*(T-302). Ms. Clancy identified defendant's (Appellant's) Exhibit F marked for identification as the type of paper she used, and noted the watermark of the Sphinx Company on each paper (T-302-303). Ms. Clancy then looked at Government Exhibits 2 and 3 (transcripts) to identify the type of paper used. She identified the paper not as Sphinx, which she claimed she had always used, as indicated by the water-mark, but as Esquire bond (T-303). Ms. Clancy used an IBM Selectric typewriter with a replaceable ball (typing element), which could be interchanged with other kinds of balls (typing elements) on any IBM Selectric (T-304).

*Sphinx rag paper.

B. The Defense's Case.

Frederick Paul Begell, a college student, testified that Mrs. Bustamante, the Appellant's wife, worked for his family as a housekeeper, and that she brought shirts to his house to sell to him and his father (T-310-311).

Luis Zurita, a travel agent, testified that the Appellant was a good working person with an excellent reputation (T-317), verifying the character evidence inadvertently put in by the prosecution when Ms. Garcia testified (T-137).

Carmen Perez Bustamante, the Appellant's wife, stated that on the night of her husband's arrest, she was sleeping in her daughter's room with her daughter (T-319), and that agents came into the house and opened a bureau drawer.

Mrs. Bustamante and her husband, the Appellant herein, both sold shirts (T-320). On the night of the Appellant's arrest, there were boxes of shirts in the living room. Mrs. Bustamante and the Appellant had been selling shirts since 1970 (T-321). Mrs. Bustamante attempted to sell shirts to her employer, Mr. Begell and his family, but they did not buy them because they thought they were too ordinary (T-322). The Appellant got the shirts from his brother Carlos, who worked in a shirt factory (T-322-323).

In 1973, there was never any cocaine in Mrs. Bustamante's home. She never saw any substance like Government Exhibit 1 (the cocaine) in her life.

On or about May 6th, 1977, Mrs. Bustamante received two telephone calls from Ana Garcia. Ms. Garcia told Mrs. Bustamante that she was "sorry about what happened to Bustamante [the Appellant], but I'll try to do all I can for both to get out well from this" (T-323). Ms. Garcia further stated that she was very nervous and sick from the whole situation, and that the reason she talked about the Appellant to the Government agents was because the Appellant was out of the country (T-324).

Mrs. Bustamante used to sell shirts to the teachers where her daughter attended school (T-328). Mrs. Bustamante did not know any persons by the name of Pepe or Dora Muñoz (T-331), nor had she ever been to 2340 Valentine Avenue, Apt. 3A, in the Bronx (T-331, 332). Mrs. Bustamante stated that if she knew her husband was a cocaine dealer, she would testify against him (T-333).

On re-direct examination, Mrs. Bustamante testified that she sold shirts to a boy named Miguel who worked in a grocery store in 1972 or 1973, and to a Gonzalez Serrano in 1972 (T-334, 335). The Appellant was responsible for selling most of the shirts (T-335). Mrs. Bustamante's chief occupation was housekeeping and she sold shirts as a sideline (T-335, 336).

On November 2nd, 1972, there were shirts in the living room of the Bustamante apartment, and one of the agents who entered the apartment looked at the shirts, which were in a box (T-337). The Appellant also sold shirts in Ecuador (T-338).

On re-cross examination, Mrs. Bustamante stated that on the night that the Appellant was arrested, there were between 50 and 70 shirts in their house (T-339). Mrs. Bustamante stated that, in addition to selling shirts, her husband, the Appellant herein, worked in the Empire State Club (T-340). The Appellant also worked for the Friars National Association, Inc., and was a union member (T-341).

Carlos Bustamante, the Appellant's brother, testified that, on the night of the Appellant's arrest, he was staying at the Appellant's home. On that same day, Carlos Bustamante had brought shirts and sweaters from work to the Appellant's house (T-346). Carlos Bustamante worked for the Capital Mercury Shirt Corporation since 1970 (T-347).

The first time Carlos Bustamante gave shirts to the Appellant was in 1970. Mr. Carlos Bustamante used to get samples and damaged shirts from his company after the line was sold out. He gave the shirts to the Appellant to sell in order to help him, because the Appellant's wife was sick. Sometimes Carlos Bustamante sold shirts to the Appellant at a minimal cost. Carlos Bustamante was not aware of the Appellant's ever having any business dealings with cocaine (T-348). Carlos Bustamante lived in the Appellant's home in September and October of 1973. (T-348-349).

Carlos Bustamante had never met Rocky Moreira, Dora Muñoz or Ana Garcia (T-349). Carlos Bustamante stated that if he knew his brother, the Appellant herein, were in the cocaine business, he would testify against him (T-353).

Gonzalez Serrano, a neighbor of the Appellant, testified that the Appellant was a working man with a good reputation. Mr. Serrano and his friend, Francisco Vasquez, bought shirts from the Appellant and his wife (T-356). Mr. Serrano's wife also bought shirts from the Appellant, and sent them as presents to relatives in South America (T-357). Mr. Serrano bought the shirts from the Appellant in 1972 and 1973; and paid approximately \$2.00 to \$3.00 per shirt. Mr. Serrano did not know Jacinto Moreira (a/k/a "Rocky") or Dora Muñoz (T-358). Mr. Serrano has known the Appellant since 1965 (T-359).

Richard F. Lawler, an Assistant U.S. Attorney in the Southern District of New York, took a statement from the Appellant on March 19th, 1977. Mr. Lawler identified defense document D as the interview sheet that was customarily used, and as the one Mr. Lawler used to question the Appellant (T363-364).

Luis Zurita was recalled by the defense, and testified that the Appellant tried to sell shirts to Mr. Zurita in 1972 and 1973, when the Appellant came to Mr. Zurita's office, but that he (Mr. Zurita) never bought any of the shirts because they were of poor quality (T-377).

POINT I: THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE GOVERNMENT'S EXHIBITS 2 AND 3, THE ALLEGED TRANSCRIPTS OF THE TAPE RECORDING OF TWO TELEPHONE CONVERSATIONS BETWEEN ANA GARCIA, ACTING AS A GOVERNMENT INFORMANT, AND THE DEFENDANT WERE IMPROPERLY ADMITTED INTO EVIDENCE BY THE DISTRICT COURT.

The critical issue before this Honorable Court can be stated as follows:

Are uncertified transcripts which are Spanish to English translations of an alleged original tape recording, which has been lost, properly admissible as secondary evidence in lieu of said tape recordings?

A. The History of the Missing Tapes.

On October 2nd, 1973, Ana Garcia decided to cooperate with the Government, and was directed by Drug Enforcement Administration agents to make two telephone calls to the defendant, which were recorded. These two conversations were in the Spanish language.

The tapes of these conversations were originally in the custody of DEA agent Mr. Joseph Sullivan. Mr. Sullivan transferred the tapes to the then-Assistant U.S. Attorney, Daniel Pykett on November 2nd, 1973 (T-208). Mr. Pykett did not recall how many tapes were made in this case, nor who the characters were on the tapes (T-266, 268).

Mr. Pykett allegedly gave the tapes to one Libia Clancy to translate and transcribe (T-267). Ms. Clancy allegedly returned the tapes and the transcripts which she prepared to Mr. Pykett.

Mr. Pykett does not know what he did with the tapes, nor what became of them (T-272, 273). He does not know if the transcriptions he received were accurate. Mr. Pykett did not make an inventory of his files at that time (T-274). There was no testimony that either Ana Garcia, the person who made the phone calls, and/or the DEA agents who were present at the time of the calls, reviewed the tapes and the transcripts to verify the accuracy of the tapes and/or the transcripts, nor were corrections and/or additions made in regard to same.

Ms. Clancy testified that she always used Sphinx rag paper when she typed transcripts. However, when defense counsel asked her to identify the paper that the transcripts were typed on, and were subsequently admitted into evidence, over defense counsel's objection, she identified the water-mark as Esquire bond (T-303).

Ms. Clancy said that she made the translations on November 7th and 8th of 1973, but had no records in Court to verify that fact. She stated that she always used Sphinx rag paper when typing transcripts; however, it was brought out on cross-examination that in fact the alleged transcripts were typed onto Esquire bond paper and not Sphinx rag paper. Ms. Clancy's initials were not found on the transcripts.

Ms. Clancy stated that she was only 90% certain that she had translated the tape, and that she had 10% doubt in her mind (T-234).

(T-234;
lines 18-21)

"Q. Are you sure you translated
that tape?

A. I'm pretty sure. 90 percent sure.

Q. There is a doubt in your mind?

A. Ten percent, yes."

Ms. Clancy had no records of payment by the Government for her work (T-239).*

The transcripts which were presented as Government evidence contained numerous spaces designated by ". . ." and other portions which are designated "(UNREADABLE)". No certificate of accuracy was supplied with regard to the transcripts (App. 54a-62a). The prosecution was unable to locate the tapes relating to the conversations which are allegedly embodied in the transcripts. The alleged transcripts were admitted into evidence over defense counsel's objections (T-276-283) (App. 54a-62a).

B. The Transcripts Should Not Have Been
Admitted Into Evidence

The prosecution, as the proponent of the aforementioned secondary evidence, has the burden of proving that the original tape recording was not lost through its own fault, and that the secondary evidence does not otherwise appear untrustworthy. United States v. Knohl, 379 F. 2d 427, (2nd Cir. 1967); 4 Wigmore, Evidence, Sec. 1192 (rev. ed. 1970); Rule 1004 and 1008 of the Federal Rules of Evidence; United States v. Augenblick, 393 U.S. 348, 355-356 (1969).

Ms. Clancy's inability to identify the alleged transcripts as her work was clearly demonstrated on the record. Ms. Clancy affirmatively

* Defense counsel duly requested the production of the alleged vouchers for the alleged translations. The request for same was denied by the trial judge (T-298). It is argued that failure to produce said vouchers clearly demonstrates that the prosecution did not comply with its burden of going forward, which is more fully argued in Part B of the instant point.

stated that she used Sphinx rag paper on cross-examination (T-233):

(T-233;
lines 6-10)

"Q. Do you see anything unusual about the paper utilized?

A. It's the type of paper I use.

Q. What kind of paper is that?

A. Sphinx rag paper."

On the following day, Ms. Clancy was recalled, and her testimony reflects the untrustworthiness of her knowledge of the transcripts (T-302-303):

(T-302;
lines 14-15)

"Q. Did you testify that you use Sphinx brand paper?

A. Yes."

(T-302;
lines 19-25
and T-303;
lines 2-3)

"Q. Miss Clancy, I show you what has been marked F for identification which is a group of papers. Is this the kind of brand you are talking about?

A. This is the brand I'm talking about.

Q. Would you take a look at those papers and hold them up to the light and see if on each one of these papers, they are all different kinds of Sphinx papers, you see the watermark of the Sphinx Company on each paper? Did you just pick up a nine by 12?"

(T-303;
lines 7-15)

"Q. I want you to take a look at the Government's exhibits and see if you see on them a watermark and can you tell me what company you see on there?

A. I see -- I can't read it.

Q. It's not Sphinx, is it?

A. It could be.

Q. Look very carefully, Miss Clancy.

A. Esquire bond.

Q. Thank you."

Ms. Clancy had been certain that she used Sphinx rag paper, but when shown Government Exhibits 2 and 3, the alleged transcripts, later admitted into evidence over defense counsel's objections, Ms. Clancy had to admit that the alleged transcripts were typed onto Esquire bond paper and not Sphinx rag paper, in direct contradiction to her prior sworn testimony!

It is respectfully submitted that the aforementioned history of the missing tapes, and the testimony of Libia Clancy, indicates that the transcripts lacked the requisite trustworthiness. Assuming arguendo that Ms. Clancy actually translated the alleged original tape recordings, the method she used was extremely susceptible to inaccuracies. Ms. Clancy's initial handwritten notes were discarded and the transcripts themselves were never certified as to their accuracy. Furthermore, the transcripts themselves indicate approximately 24 spaces marked by ". . ." or "(UNREADABLE)" (see App. 54a-62a).

The Government is clearly responsible for the loss of the tapes, and there has been no conclusive evidence brought to bear which has established the veracity of the tapes. On the contrary, the evidence has cast serious doubt on the authenticity of the tapes.

It is respectfully submitted that the Government has not made a diligent search for the missing tape or tapes. Wigmore on Evidence, Vol. 4, Sec. 1194 at 441 states that the party proving the document "must have used all reasonable means to obtain the original." Mr. Akerman, in his affidavit, stated that the search for the tapes began on March 18th, 1977, almost three years after the tapes were made. The search merely consisted of inspecting the evidence safe of the U.S. Attorney's Office and questioning Daniel Pykett about his knowledge of the tape. This search was not adequate in light of the facts of this case. Many people were involved in the investigation of this case, and specifically in handling the tapes, but only one person was produced and testified for the prosecution with regard to the missing tape(s). The tapes may have been misplaced in an infinite number of locations, and yet only the safe of the U.S. Attorney's Office was searched.

Furthermore, even though the burden of obtaining an original may be excused because of loss or destruction, it is necessary to authenticate the absent original evidence, pursuant to Rule 901 of the Federal Rules of Evidence. 5 Weinstein, United States Rules, at 1004-10.1. Before proof of contents of the original can be admitted, the Court should be satisfied that a reasonable juror could find the existence of the original as if the original were produced. Id. It has long been held that sound recordings are admissible into evidence, provided a proper foundation consists of the following elements:

1. That the recording device was capable of taping the conversations now offered in evidence;

2. That the operator of the device was competent to operate the device;
3. That the recording is authentic and correct;
4. That changes, additions, deletions have not been made in the recording;
5. That the recording has been preserved in a manner that is shown to the Court;
6. That the speakers are identified;
7. That the conversation elicited was made voluntarily and in good faith without any kind of inducement.

United States v. McKeever, 169 F. Supp. 426 (S.D.N.Y., 1958), reversed on other grounds; 271 F. 2d 669 (2nd Cir. 1959), quoted with approval in 5 Weinstein, United States Rules, 901-70. Clearly, requirements 3, 4 and 7 have not been met by the prosecution in this case.

The person who had the most direct contact with the tapes was the translator/transcriber, and she had doubt in her mind as to whether the Government Exhibits 2 and 3 were the same transcripts she translated and typed. "Transcripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence." United States v. McMillan, 508 F. 2d 101 (8th Cir. 1974), cert. den. 1975. Defense counsel consistently objected to the transcripts' admission into evidence (T-276-283).

Great caution should be exercised when admitting secondary evidence such as tape recordings, and even greater care should be exercised

when the only evidence of the existence of a tape recording is the translation, not a direct transcript in Spanish from the original tape. The Court stated in United States v. Starks, 515 F. 2d 112 (3rd Cir. 1975):

" While proof of facts creating a sufficient foundation for the admission of a tape recording is a matter to be decided by the trial court, it does not have unbridled discretion to disregard the problems inherent in use of such evidence. Tape recordings are not readily identifiable as the original version. They are peculiarly susceptible to alteration, tampering, and selective editing." (Emphasis supplied)

In United States v. Maxwell, 383 F. 2d 437 (2nd Cir. 1967), cert. den. 384 U.S. 1043 (1968), a transcript of a tape recording that had been erased was admitted into evidence at the trial. The admissibility of said transcript was upheld on appeal. In the instant case, we are dealing with an alleged Spanish tape recording which was translated into handwritten notes, which were discarded and then a typewritten transcript was created and admitted into evidence (T-237).

It is respectfully submitted that the further removed a transcript is from the original, the more prone it is to error. The prime reasons for the best evidence rule are:

" As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or inadvertance; this contingency wholly disappears when the original is produced. Moreover, the original may contain, and the copy will lack, such features as handwriting, paper and the like, as may afford the opponent valuable means of learning objections to the significance of the document." 4 Wigmore, Sec. 1179 (rev. ed. 1970)

In Maxwell, supra, this Honorable Court stated, at 443:

" ...we regret the government's conduct in not supervising their handling more carefully and allowing the tapes to be erased while charges against Maxwell were outstanding..."

It is no longer adequate to excuse the Government's carelessness and irresponsibility with mere regret. This Court can exercise its supervisory powers and suppress the transcripts in the instant case, thereby preventing a dangerous trend from developing. United States v. Bryant, 439 F. 2d 642, 650-653 (D.C. Cir. 1971), and United States v. Bryant, 448 F. 2d 1182 (D.C. Cir. 1971).

For all of the aforementioned reasons, it is respectfully submitted that the transcripts, Government Exhibits 2 and 3, were improperly admitted as evidence in the Honorable Court below, and deprived defendant of a fair trial.

**POINT II: THE INSUFFICIENCY OF EVIDENCE IN
THE TRIAL RECORD ON THE ISSUE OF
THE DEFENDANT'S ALLEGED AGREEMENT
TO PARTICIPATE IN A CONSPIRACY RE-
QUIRES A REVERSAL BY THIS HONORABLE
COURT.**

The Government's evidence in the trial record, which supposedly proved the existence of an unlawful agreement, an essential element in a criminal conspiracy, consisted primarily of testimony from Ana Garcia, a Government informant, and alleged transcripts of a tape recording (lost by the Government) of a telephone conversation between the defendant and Ana Garcia, acting in her role as a Government informant (App. 54a-62a).

The Appellant contends that there was no evidence in the record as to an unlawful agreement, a crucial element to the offense charged. Not once in the alleged transcripts is there any mention of drugs or cocaine. There is only talk of shirts, which the defendant and his wife used to sell to earn some extra money to supplement their minimal incomes (App. 54a-62a). Assuming arguendo that the transcripts are inadmissible, pursuant to Point I, the only relevant evidence remaining is Ana Garcia's contradictory and unconvincing testimony (T-114-155). Ms. Garcia testified that Rocky told her (Mrs. Garcia) that he gave cocaine to the Appellant. Ms. Garcia later testified that the Appellant told her (Ms. Garcia) that he (the Appellant) never received cocaine from Rocky (T-138).

The majority of Ana Garcia's testimony regarding the defendant consisted of speculative hearsay. Ms. Garcia testified that Rocky told her he was going to leave some cocaine with the Appellant "to see if

he could sell it." (T-86). There is no direct testimony to indicate that the Appellant ever received the cocaine or that he ever sold it.

Ana Garcia testified that the Appellant came to the house several days after Rocky cocaine. No testimony was offered regarding the defendant's handling or testing the cocaine.

Ana Garcia testified that she never saw the defendant selling cocaine. Ms. Garcia had only heard about it through Rocky, a convicted felon (T-115). Ms. Garcia never saw the Appellant pay Rocky money for cocaine; never saw the Appellant receive cocaine from Rocky; never saw the Appellant give Rocky cocaine (T-135, 136).

Ms. Garcia said at one point that she had seen the Appellant with cocaine, and at another point, that she had never seen the Appellant with cocaine (T-144). Ms. Garcia stated that all she knew about Rocky's cocaine business was what Rocky told her about it (T-137). The defendant contends that such speculative evidence should not be permitted to provide the basis for convicting a person of a crime.

In Guevara v. United States, 242 F. 2d 745 (5th Cir. 1957), the Court of Appeals reversed the conviction of the defendant for possession of marijuana, due to the insufficiency of evidence. The Court declared, at 747:

" A jury must not be left to speculate and surmise in a criminal case, merely hoping that they are drawing the proper inference."

In United States v. Freie, 545 F. 2d 1217 (9th Cir. 1976), the Court reversed the conspiracy conviction of the defendant due to insufficiency of evidence. At page 1222, the Court stated that even

"...slight evidence must be of the quality which will reasonably support a conclusion that the particular defendant in question wilfully participated in the unlawful plan with the intent to further some object or purpose of the conspiracy."

Even if Ana Garcia had seen the defendant in the same room as the cocaine was located, this would not be enough to convict the defendant of conspiracy to distribute. In United States v. Ferg, 504 F. 2d 914 (5th Cir. 1974), the Court of Appeals declared, at 916, that, although evidence supporting a conviction must be viewed most favorably to the Government, evidence that the defendant had been a passenger in an automobile in which marijuana was concealed, and that he had been travelling with the person who admitted purchasing the marijuana, was insufficient to sustain defendant's conviction of unlawfully participating in the distribution of it.

In United States v. Spanos, 462 F. 2d 1012 (9th Cir., 1972), the defendant was convicted of conspiracy to sell drugs. On appeal, his conviction was reversed and his indictment was dismissed. The Court of Appeals reversed because the Government had not proved its case, even though there was evidence that the defendant had sold large quantities of drugs, and had made arrangements with others to do so. In the instant case, far less evidence was admitted at trial; in fact, there was no evidence admitted on the issue of the defendant's agreeing to participate in the sale or the distribution of narcotics.

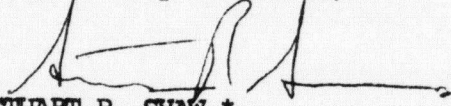
It is respectfully submitted that Mr. Bustamante's conspiracy conviction be reversed for insufficient evidence.

" When the evidence at trial is insufficient to prove the commission of any crime, it is not difficult to conclude that an appellate court should enter a judgment of acquittal and order the defendant discharged from further prosecution." Comment, Charles A. Thompson, C. Thompson, Reversals for Insufficiency of the Evidence: The Emerging Doctrine of Appellate Acquittal, 8 Ind. L. Rev., 497, 519 (1974).

CONCLUSION

FOR ALL THE AFOREMENTIONED REASONS, THE
CONVICTION IN THE COURT BELOW SHOULD BE
REVERSED AND THE INDICTMENT DISMISSED OR,
IN THE ALTERNATIVE, A NEW TRIAL GRANTED,
WITH THE ERRONEOUSLY ADMITTED TRANSCRIPTS
EXCLUDED.

Respectfully submitted,


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* Defense counsel wishes to acknowledge, and appreciates, the efforts of Rachel Potasznik, a first-year law student at Benjamin Cardozo School of Law, in the preparation of this brief.

**COURT OF APPEALS
SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee

- against -

LOUIS BUSTAMANTE,

Plaintiff-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the ~~31st~~ day of ~~August~~ 19 ~~77~~ at ~~One St Andrews Plaza~~
~~1st~~ ~~September~~ New York, New York upon
deponent served the annexed

Appendix

U.S Atty Southern Dist.

Brief

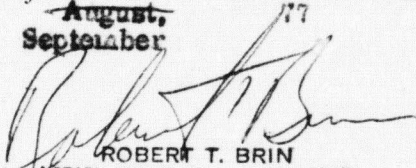
Robert F. Isaac

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this

day of ~~August~~ 19 ~~31st~~ ~~1st~~

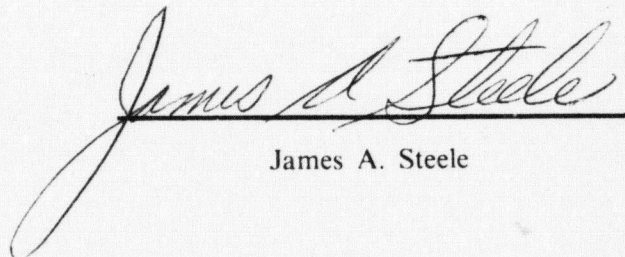
~~September~~



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950

Qualified in New York County

Commission Expires March 30, 1979



James A. Steele